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Docket No. 71836-012

PATENT



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of : Customer Number: 20277
WOLFGANG LUDWIG : Confirmation Number: 3668
Application No.: 09/808,398 : Group Art Unit: 1761
Filed: March 14, 2001 : Examiner: D. Becker
For: METHOD OF AND APPARATUS FOR THE PROCESSING OF MEAT

SUPPLEMENTAL APPEAL BRIEF

Mail Stop Appeal Brief
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This Appeal Brief is submitted in support of the Notice of Appeal filed on February 28 2005, wherein Appellants appealed from the primary Examiner's final rejection of claims 11 and 17 through 21, and in response to the Notification of Non-Complaint Appeal Brief dated June 21, 2005.

I. Real Party In Interest

The real party and interest is Wolf-Tec, Inc.

II. RELATED APPEALS AND INTERFERENCES

Appellant is unaware of any related Appeal or Interference.

III. STATUS OF CLAIMS

Claims 11 and 17 through 41 are pending in this application. Claims 1 through 10 and 12 through 16 have been cancelled. Claims 11 and 17 through 41 are have been finally rejected. It is from the final rejection of claims 11 and 17 through 41 that this Appeal is taken.

IV. STATUS OF AMENDMENTS

An Amendment was submitted pursuant to 37 CFR §1.116 on January 12, 2005 subsequent to the issuance of the final Office Action dated December 14, 2004. According to the Advisory Action dated January 26, 2005, the Amendment pursuant to 37 C.F.R. §1.116 will be entered if an Appeal is taken. Since an Appeal has been taken, Appellant is proceeding on the basis that the Amendment submitted pursuant to 37 C.F.R. §1.116 has been entered, that the rejection under the second paragraph of 35 U.S.C. §112 has been withdrawn, and that the rejections under 35 U.S.C. §102 and 35 U.S.C. §103 predicated primarily upon Bellue have been withdrawn.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

Independent Claim 11

The apparatus (Fig 1, reference character 10) defined in independent claim 1 comprises a rotating paddle massager or rotating vessel tumbler containing impact veins (page 6 of the specification, line 17); page 8, lines 22 through 25; page 9, lines 1 and 2; page 11, lines 15 through 18; Fig. 1, reference character 12), a jacket (page 6, line 22; page 8, line 8; page 11, lines 21 through 25; Fig. 1, reference character 20), and means for selectively heating and cooling the vessel during agitation; (page 6, lines 22 through 26). As specifically set forth in the claims, the recited means for selectively heating and cooling the vessel comprises a refrigeration unit for circulating a cooling liquid

through the jacket and a heater for passing the heated liquid through the jacket (page 6, lines 22 through 26). In addition, the apparatus defined in claim 11 comprises a temperature sensor (page 6, line 26 through page 7, line 4), having a member which is capable of being thrust into the vessel to pierce a body of meat therein (page 8, lines 8 through 10; page 13, lines 8 through 11; Fig. 3, reference character 41), the member comprising a plurality of sensing regions along a length thereof (page 7, lines 10 through 13; page 13, lines 15 through 21; Fig. 4, reference characters 48, 49, 50 and 51).

Independent Claim 17

Independent claim 17 is directed to an apparatus (Fig. 1, reference character 10) which comprises a rotating paddle stationary vessel massager or rotating vessel tumbler containing impact veins (page 6 of the specification, line 17; page 8, lines 22 through 25; page 9, lines 1 and 2; page 11, lines 15 through 18; Fig. 1, reference character 12) and means for selectively heating and cooling the vessel during agitation of the bodies of meat (page 7, lines 22 through 26). As specifically recited in claim 17, the means for selectively heating and cooling the vessel includes means for selectively circulating a heated and a cooled liquid through the jacket, which means are defined at page 6 of the written description of the specification, lines 22 through 26, to include a refrigeration unit for circulating a cooling liquid through a jacket (page 6, line 22; page 8, line 8; page 11, lines 21 through 25; Fig. 1, reference character 20) and a heater for passing a heating liquid through the jacket. The apparatus defined in independent claim 17 further comprises programming means for raising a temperature of the bodies of meat to a predetermined elevated temperature while massaging the bodies of meat with a controlled torque (page 9, line 7 through page 10, line 14).

Independent Claim 21

Independent claim 21 is directed to an apparatus (Fig. 1, reference character 10), which comprises a rotating paddle stationary vessel massager or rotating vessel tumbler (page 6 of the specification, line 17; page 8, lines 22 through 25; page 9, lines 1 and 2; page 11, lines 15 through 18; Fig. 1, reference character 12), means for selectively heating and cooling the vessel while agitating the bodies of meat therein, which means is disclosed at page 6 of the written description of the specification, lines 22 through 26, to include a refrigeration unit for circulating a cooling liquid through a jacket and a heater for passing a heating liquid through the jacket, and a jacket on the vessel for circulating a liquid therethrough for selectively heating and cooling the vessel while agitating the bodies of meat (page 6, line 22; page 8, line 8; page 11, lines 21 through 25; Fig. 1 reference character 20).

Independent Claim 29

Independent claim 29 is directed to an apparatus (Fig. 1, reference character 10) comprising a rotating paddle stationary vessel massager a rotating vessel tumbler containing impact veins (page 6 of the specification, line 17; page 8, lines 22 through 25; page 9, lines 1 and 2; page 11, lines 15 through 18; Fig. 1, reference character 12), means for maintaining the bodies of meat during agitation at a predetermined elevated temperature by selectively heating and cooling the vessel while agitating the bodies of meat, which means include a refrigeration unit for circulating a cooling liquid through the jacket and a heater for passing a heating liquid through the jacket (page 6, lines 22 through 26), and a temperature sensor operatively connected to the means for selectively heating and cooling the vessel for controlling the temperature of the vessel during agitation of the bodies of meat (page 6, line 26, through page 7, line 4). The claimed apparatus further comprises a jacket for circulating a temperature

controlling fluid (page 6, line 22; page 8, line 8; page 11, lines 21 through 25; Fig. 1, reference character 20).

Independent Claim 33

Independent claim 33 is directed to an apparatus (Fig. 1, reference character 10) which comprises a rotating paddle stationary vessel massager a rotating vessel tumbler containing impact veins (page 6 of the specification, line 18; page 8, lines 22 through 25; page 9, lines 1 and 2; page 11, lines 15 through 18; Fig. 1, reference character 12), means for maintaining the bodies of meat during agitation at a temperature range of 45°F to 60°F by selectively heating and cooling the vessel while agitating the bodies of meat therein, which means include a refrigeration unit for circulating a cooling liquid through a jacket and a heater for passing a heating liquid through the jacket (page 6, lines 22 through 26) and a temperature sensor operatively connected to the refrigeration unit and heater (page 6, line 26, through page 7, line 4). The claimed apparatus further comprises a jacket for circulating a temperature controlling fluid (page 6, line 22; page 8, line 8; page 11, lines 21 through 25; Fig. 1, reference character 20).

As discussed in the first paragraph on page 1 of the written description of the specification, conventional meat massaging involves the use of an apparatus designed and structured to maintain bodies of meat at a **low temperature**, as at about 23°F, during massaging. However, Appellant observed and addressed problems attendant upon such conventional cold massaging techniques. These problems include impeded massaging due to the formation of a coating which prevents penetration, absorption and/or dispersion of the treating solution throughout a body of meat, as well the lack of uniform internal coloration and ineffective utilization of additives (page 2, line 25 through page 3, line

20). Appellant's solution to this problem runs **counter to conventional wisdom and practices** by providing an apparatus structured to maintain bodies of meat **during massaging at an elevated temperature**, as at about 45° of to 60°F (page 5, lines 2 through 8). It was found that a vessel structure to maintain bodies of meat and an elevated temperature during massaging resulted in a more rapid, thorough and uniform distribution of the treating liquid within the meat and a substantially reduced coating on the surface of the meat, as well as limited breakdown of ingredients (paragraph bridging pages 9 and 10). The notion of structuring an apparatus to maintain bodies of meat at an **elevated temperature during massaging** is alien to the applied prior art.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL¹

- 1. Claims 21, 26, 29, 30, 33, 34 and 39 through 41 stand finally rejected under 35 U.S.C. §103 for obviousness predicated upon Horn et al. in view of Gould;**
- 2. Claims 17, 27 and 38 stand finally rejected under 35 U.S.C. §103 for obviousness predicated upon Horn et al. in view of Gould and Ludwig;**
- 3. Claims 11, 22 through 25, 31, 35 and 37 stand finally rejected under 35 U.S.C. §103 for obviousness predicated upon Horn et al. in view of Gould and DE 3119496A (DE ‘496);**
- 4. Claims 18 through 20 and 28 stand finally rejected under 35 U.S.C. §103 for obviousness predicated upon Horn et al. in view of Gould, Ludwig and DE ‘496; and**
- 5. Claims 32 and 36 stand finally rejected under 35 U.S.C. §103 for obviousness predicated upon Horn et al. in view of DE ‘496, Gould and Ludwig.**

VII. ARGUMENT

For the convenience of the Honorable Board of Patent Appeals and Interferences (the “Board”), Appellant only separately argues the patentability of each of independent claims 11, 17, 21, 29 and 33. Accordingly: claim 37 stands or falls with independent claim 11; claims 18 through 20 and 38 stand or fall with independent claim 17; claims 22 through 28 and 39 stand or fall with independent claim 21; claims 30 through 32 and 40 stand or fall within independent claim 29; and claims 34 through 36 and 41 stand or fall with independent claim 33.

¹ In the Advisory Action of January 26, 2005, the Examiner indicated that the rejection under the second paragraph of 35 U.S.C. §112 and the rejections under 35 U.S.C. §102 and 35 U.S.C. §103 predicated primarily upon Bellue have been overcome and, hence, presumably withdrawn on appeal.

Claims separately argued

Claims 11, 17, 21, 29 and 33.

Groupings of claims argued:

1. Claims 11 and 37;
2. Claims 17, 18 through 20 and 38;
3. Claims 21 though 28 and 39;
4. Claims 29 through 32 and 40; and
5. Claims 33 through 36 and 41.

Opening Statement

Prior to addressing the Examiner's specific rejections, Appellant would stress that it remains **undisputed** on this record that **conventional** meat massaging techniques employed a **low temperature**; whereas, Appellant addresses and solves **heretofore unrecognized problems** attendant upon such prior art cold massaging techniques by structuring an apparatus to maintain bodies of meat at an elevated temperature during massaging such that the treating liquid is effectively distributed within the bodies of meat.

**1. The rejection of claims 21, 26, 29, 30, 33, 34 and 39 through 41 under 35 U.S.C. §103
for obviousness predicated upon Horn et al. in view of Gould.**

The Examiner's Position

The Examiner begins with a primary reference to Horn et al. who do disclose an apparatus, such as a paddle massager, used for massaging or tumbling bodies of meat with a marinating liquid. The disclosed apparatus comprises a jacket for circulating a **refrigerant** therethrough. The Examiner recognizes that the apparatus disclosed by Horn et al. does **not** contain a heating means. Of course it does not. This is because it is an objective of Horn et al. to conduct **rapid chilling during tumbling**. Undaunted by or ignoring what Horn et al. seek to accomplish, the Examiner concluded that one having ordinary skill in the art would somehow have been motivated to proceed completely **against** the objectives and teachings of Horn et al. by impressing heating means into the apparatus of Horn et al. Why? Certainly not to employ a refrigerant to effect rapid chilling. Because heating means was perceived to reside in the reference to Gould.²

In the Advisory Action dated January 26, 2005, the Examiner initially interpreted the structural requirement of each of the independent claims for heating means as nonlimiting as though it did not exist. The Examiner then backed off and construed heating means as an intended use, which it is not because it is a structural limitation. The Examiner finally retreated to Gould but regardless of whatever Gould teaches, it can not supply the requisite fact-based motivation to destroy the objective of Horn et al.

² Appellant notes that the Examiner previously rejected claims 29 and 33 under 35 U.S.C. §102 based upon Gould in the Office Action dated September 24, 2004. However, the Examiner quickly abandoned reliance upon Gould after submission of the Amendment dated November 18, 2004, in which Appellant argued that Gould et al. actually teach massaging at lower temperatures than the temperature of 32° F to 34°F, certainly lower than the temperature employed by Appellants, and only disclosed elevated temperatures for dehydrating and cooking but not for maintaining bodies of heat during agitation. In fact, Gould is completely silent with respect to the concept of selectively heating and cooling to optimize treatment with a fluid during massaging as in the claimed invention.

Appellant's Position

As to each of independent claims 21, 29 and 33, Appellant submits that the Examiner's approach is totally unrealistic. It can not be gainsaid that the reason Horn et al. do not disclose an apparatus containing heating means is simply because Horn et al. do not want to heat anything. Rather, Horn et al. are concerned only with **rapid chilling**, because to Horn et al. heat is problematic.

The Examiner failed to comply with consistent judicial precedent by making clear and particular factual findings as to a specific understanding or specific technological principle and then, based upon such factual findings, explain **why** one having ordinary skill in the art would have been realistically impelled to modify particular prior art, in this case, the "**refrigerated cylindrical drum paddle agitator mixer**" disclosed by Horn et al. (column 1, lines 9 through 11), to arrive at the claimed invention. *In re Lee*, 237 F.3d 1338, 61 USPQ2d 1430 (Fed. Cir. 2002); *In re Kotzab*, 217 F.3d 1365, 55 USPQ 1313 (Fed. Cir. 2000); *In re Dembiczaik*, 175 F.3d 994, 50 USPQ2d 1614 (Fed. Cir. 1999). In this respect, Appellant would stress that the apparatus disclosed by Horn et al. is intended to effect **rapid vacuum chilling**. Indeed, advertizing to column 2 of Horn et al., lines 39 through 51, it is disclosed that vacuum chilling and tumbling work well for certain meats, such as ham. However, it is not effective for other meat products, notably poultry. This is because there is insufficient heat exchange area per volume to effectively **chill** the poultry during a **short** massaging cycle of only 20 to 25 minutes. There is simply not enough time during this short vacuum massage cycle for efficient heat transfer to occur to reduce the temperature. In column 2 of Horn et al., lines 13 and 14, it is made clear that the problem addressed and solved by Horn, as well as others in the industry, is the **problem of heat generation**. In short, heat is a bad actor; fast chilling is desired.

Consistent with the above goal of **avoiding heating and effecting rapid chilling**, Horn et al. provide a structure with a hollow paddle agitator to **reduce heat** and **maximize heat exchange**,

thereby resulting in a product that “... is chilled at an extremely rapid rate” (column 3 of Horn et al., lines 20 and 21).

As Horn et al. want **rapid chilling** and want to **avoid heating**, Appellant submits it is inconceivable that one having ordinary skill in the art would somehow have been realistically impelled to **impress heating means** in the apparatus disclosed by Horn et al. *In re Lee supra*, *In re Rouffet, supra*. Indeed, Appellant relies upon the well established legal tenet that one having ordinary skill in the art cannot be realistically motivated to modify a reference in a manner of which is **antithetic** to the disclosed objective, i.e., provide heating means in order to achieve rapid chilling. In fact, any such modification of the device disclosed by Horn et al. would render it **inoperative** for its intended purpose. *In re Fritch*, 972 F.2d 1260, 23 USPQ2d 1780 (Fed. Cir. 1992); *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984); *In re Schulpen*, 390 F.2d 1009, 157 USPQ 52 (CCPA 1968).

Independent Claim 21

Independent claim 21 requires, as a structural limitation, means for selectively heating and cooling the vessel during agitation of the bodies of meat. This is a structural limitation. The Examiner admits that the primary reference to Horn et al. does not contain any heating means. Indeed, as previously stressed, heat is antithetic to the objective of Horn et al. Heat is a problem. **Horn et al. seek to avoid heating by effecting rapid chilling.** There is nothing in Gould which could possibly suggest destroying the objective of Horn et al. by impressing heating means in the apparatus. To say that the impression that heating means in the apparatus of Horn et al. would effect rapid chilling strains credulity.

Moreover, as previously argued in the November 18, 2004 Amendment in overcoming a rejection of under 35 U.S.C. §102 predicated upon Gould, a temperature of 32°F to 34°F is disclosed

as an appropriate temperature when processing meat to facilitate the distribution of a curing agent and to ensure a greater release of myosin. Thus, temperatures of 34°F and lower are the temperatures disclosed by Gould. But Horn et al. deal with a very short vacuum massage cycle and require rapid chilling. How rapid chilling can be effected by heating means to satisfy the objective of Horn et al. has not been articulated on this record with commendable clarity.

In the continuation sheet appended to the January 26, 2005 Advisory Action, the Examiner seems to rely upon “what the combined teachings of the references would have suggested to those of ordinary skill in the art” and then asserted that Gould’s heater “would act to maintain the temperature range of Horn et al. under diverse surrounding ambient conditions, and would adjust the temperature of the meat to maintain this range”. This conclusion ignores the fact that Horn et al. want rapid chilling.

The bottom line is that Horn et al. do not want to heat anything because the generation of heat is problematic. Horn et al. seek to effect rapid chilling. There is no conceivable way that Gould would have suggested to one having ordinary skill in the art the idea of modifying the apparatus disclosed by Horn et al. to provide a heating means, because such a modification is **inconsistent with the objective** of Horn et al. *In re Fitch, supra; In re Gordon, supra; In re Schulpen, supra.*

Independent Claim 29

Independent claim 29 requires means to maintain the bodies of meat during agitation at a predetermined elevated temperature sufficient to effect rapid, thorough and uniform distribution of liquid within the meat, and to substantially reduce formation of a protein/water film, by selective heating and cooling the vessel while agitating the bodies of meat therein. As argued with respect to independent claim 21, the Examiner has failed to provide the requisite fact-based motivation which would have realistically impelled one having ordinary skill in the art to modify the apparatus disclosed by Horn et al., structured to effect rapid chilling, by providing heating means, let alone heating means capable of maintaining the bodies of meat during agitation at a predetermined elevated temperature sufficient to achieve the results specified in claim 29, i.e., rapid and uniform distribution of the liquid and substantially reduced formed of a protein/water film.

Independent Claim 33

Independent claim 33 requires means to maintain the bodies of meat during agitation at substantially 45°F to 60°F by selectively heating and cooling the vessel during agitation. As previously argued with respect to independent claim 21, one having ordinary skill in the art would not have been realistically motivated to modify the apparatus disclosed by Horn et al. by providing heating means, because this would atheistic to the disclosed objective and render the invention of Horn et al. inoperative. *In re Fitch, supra; In re Gordon, supra; In re Schulpen, supra.* Moreover, the notion of maintaining bodies of meat at a temperature of 45°F to 60°F is completely inconsistent with the rapid chilling objective of Horn et al.

Based upon the foregoing, Appellant submits that the Examiner fails to establish a *prima facie* basis to deny patentability through any of independent claims 21, 29 and 33 the lack of the requisite realistic motivation. Moreover, there are potent indicia of **nonobviousness** which undermine the Examiner's obviousness conclusion.

Indicia of Nonobviousness

It is clear that Horn et al. **teach away** from the claimed invention by avoiding heat and effecting rapid chilling. This **clear teaching away** from the claimed invention by the primary reference to Horn et al. constitutes a potent indicium of **nonobviousness**. *Ecolochem Inc. v. Southern California Edison, Co., supra; In re Bell, 991 F.2d 781, 26 USPQ2d 1529 (Fed. Cir. 1993); Specialty Composites v. Cabot Corp., 845 F.2d 981, 6 USPQ2d 1601 (Fed. Cir. 1988); In re Hedges, 783 F.2d 1038, 228 USPQ 685 (Fed. Cir. 1986); In re Marshall, 578 F.2d 301, 198 USPQ 344 (CCPA 1978).*

As previously argued, Appellant discovered problems attendant upon conventional practices of massaging bodies of liquid-injected meat at a relatively low temperature. Applicant's discovery of such problems constitutes another potent indicium of **nonobviousness** which merits consideration, particularly since the **primary reference** to Horn et al. **teaches away** from the claimed invention. *In re Sponnoble, 405 F.2d 578, 160 USPQ237 (CCPA 1969).*

Conclusion

Based upon the foregoing, it should be apparent that a *prima facie* basis to deny patentability to the inventions defined in each of independent claims 21, 29 and 33 and, consequently, the claims dependent thereon, has not been established for lack of the requisite factual basis and want of the requisite realistic motivation. Moreover, upon giving due consideration the potent indicia of

nonobviousness stemming from the clear teaching away from the claimed invention by the primary reference to Horn et al. and Appellant's **discovery of problems** attendant upon prior art practices, the conclusion appears inescapable that one having ordinary skill in the art would not have found the claim subject matter as a whole obviousness within the meaning of 35 U.S.C. §103. *In re Piasecki*, 745 F.2d 1468, 223 USPQ 785 (Fed. Cir. 1984).

2. The rejection of claims 17, 27 and 38 under 35 U.S.C. §103 for obviousness predicated upon Horn et al. in view of Gould and Ludwig.

Initially, claim 27 stands or fall with independent claim 21, and claim 38 stands or falls within independent claim 17.

The apparatus defined in independent claim 17 comprises means for selectively heating and cooling the vessel during agitation of the bodies of meat, which means includes means for selectively circulating a heated and a cool fluid through the jacket. As previously stressed, one having ordinary skill in the art would **not** have been realistically impelled by Gould to modify the apparatus disclosed by Horn et al. by impressing therein heating means, because such would be atheistic to the objective of Horn et al., and, indeed, render the invention of Horn et al. inoperative. *In re Fitch, supra; In re Gordon, supra; In re Schulpen, supra.*

Moreover, the apparatus is defined in independent claim 17 requires programming means for raising a temperature of the bodies of meat in the massaging drum to a predetermined elevated temperature during massaging. Why one having ordinary skill in the art would somehow have been motivated to provide to modify the apparatus of Horn et al. by providing programming means for elevating the temperature is a mystery, particularly since Horn et al. seek to affect **rapid chilling**

during a short massage cycle. *Ecolochem Inc. v. Southern California Edison, Co., supra; In re Rouffet, supra.*

The tertiary reference to Ludwig does not cure the argued deficiencies in the Examiner's attempted combination of Horn et al. and Gould. Appellant, therefore, submits that the Examiner failed to establish a *prima facie* basis to deny patentability to the invention defined in independent claim 17 and claim 38 dependent thereon under 35 U.S.C. §103 for lack of the requisite factual basis and want of the requisite realistic motivation. Moreover, as previously argued, the clear **teaching away** from the claimed invention by the primary reference to Horn et al. constitutes a potent indicum of nonobviousness. *Ecolochem Inc. v. Southern California Edison, Co., supra; In re Bell, supra; Specialty Composites v. Cabot Corp., supra; In re Marshall, supra.* It remains undisputed on this record that Appellant discovered problems attendant upon conventional practices of massaging bodies of liquid-injected meat at a relatively low temperatures. Appellant's discovery of such problems constitutes another potent indicum of **nonobviousness**. *In re Sponnable, supra.*

The failure of the Examiner to establish a *prima facie* basis to deny patentability to the claimed invention considered with the potent indicia of nonobviousness compel the conclusion that one having ordinary skill in the art would not have found the claim subject matter as a whole obvious within the meaning of 35 U.S.C. §103.

3. The Rejection of claims 11, 22 through 25, 31, 35 and 37 under 35 U.S.C. §103 for obviousness predicated upon Horn et al. in view of Gould and DE'496.

Initially, Appellant notes that claims 22 through 25 stand or fall with independent claim 21, claim 31 stands or fall with independent claim 29, and claim 37 stands or falls with independent claim 11.

The apparatus defined in **independent claim 11** comprises means for selectively heating and cooling the vessel during agitation of the bodies of meat, together with a jacket through which a heated liquid and a cool liquid are selectively passed. As previously argued, one having ordinary skill in the art would not have been realistically motivated by Gould to modify the apparatus disclosed by Horn et al., which is designed for rapid chilling, to provide heating means as in the claimed invention, because that is completely inconsistent with the objective of Horn et al. and would destroy the invention of Horn et al. rendering it inoperable. *In re Fitch, supra; In re Gordon, supra; In re Schulpen, supra.*

Independent claim 11 further requires a temperature sensor positioned for direct contact with bodies of meat. Given the objective of rapid chilling due a short massaging cycle, it strains credulity to say that one having ordinary skill in the art would somehow have been motivated to stop and take temperature measurements. This is because Horn et al., seek to cool as fast as possible. In this respect, Appellant notes that DE'496 is not concerned with rapid chilling as are Horn et al.

Appellant, therefore, submits that the Examiner failed to establish a *prima facie* basis to deny patentability to the invention defined in independent claim 11, and claim 37 dependent thereon, for lack of the requisite factual basis and want of the requisite realistic motivation. Moreover, upon giving due consideration to the clear **teaching away** from the claimed invention by the primary reference to Horn et al., and Appellant's **discovery of problems** attendant upon conventional cold massaging techniques, the conclusion inescapable that one having ordinary skill in the art would not have found the claimed subject matter as a whole obvious within the meaning of 35 U.S.C. §103. *In re Piasecki, supra.*

4. The Rejection of Claims 18 through 20 and 28 under 35 U.S.C. §103 for obviousness predicated upon Horn et al. in view of Gould, Ludwig and DE '496.

Appellant does not separately argue the patentability of claim 18 through 20 and 28. Claims 18 through 20 stand or fall with independent claim 17 and 28 stands or fall with independent claim 1.

5. The Rejection of claims 32 and 36 under 35 U.S.C. §103 for obviousness predicated upon Horn et al. in view of DE'496, Gould and Ludwig.

Appellant does not separately argue the patentability of claims 32 and 36. Claim 32 stands or falls with independent claim 29, and claim 36 stands or fall with independent claim 33.

Summary

The Examiner failed to establish a *prima facie* basis to deny patentability to the invention defined in any of the independent claims, because the Examiner begins with a primary reference (Horn et al.) that seeks to effect rapid chilling in a short period of time. It is inconceivable that one having ordinary skill in the art would have been realistically motivated to impress into the apparatus of Horn et al. any heating means, because that would destroy the invention of Horn et al. *In re Fitch, supra; In re Gordon, supra; In re Schulpen, supra.* Further, as previously stressed, this clear teaching away from the claimed invention by the primary reference to Horn et al., coupled with the undisputed fact that Appellant discovered problems attendant upon conventional cold massaging techniques, compel the conclusion that one having ordinary skill in the art would not have found the claimed subject matter as a whole obviousness within the meaning of 35 U.S.C. §103. *In re Piasecki, supra.*

VIII. PRAYER FOR RELIEF

Based upon the arguments submitted *supra*, Appellant submits that none of the imposed rejections under 35 U.S.C. §103 predicated primarily upon Horn et al. is factually or legally viable. Appellant, therefore, solicits the Honorable Board to reverse each of the Examiners rejections under 35 U.S.C. §103

Issues related to the appealed claims

The Examiner checked box 7 which indicated the Brief does contain a correct copy of the appealed claims as an Appendix thereto. The Examiner is wrong. The appendix contains the appealed claims. The Examiner appears to be of the opinion that cancelled claims should be included in the claimed appendix. Since cancelled claims are not on appeal, Appellant hereby questions bases for the Examiner's requirement for cancelled claims to appear in the Appendix. Appellant would refer to 35 U.S.C. §41.35(diii) which reads as follows:

Claims Appendix A. An Appendix containing a copy of the claims **involved in the appeal**. (Emphasis supplied) Since the cancelled are not "involved in the appeal", Appellant did not include the cancelled claims in the appeal. Should the Examiner persist in preventing this case from reaching the Board by requiring cancelled claims to be in the Appendix, the Examiner is requested to provide a bases for such requirement. To not do so would be violating Appellant right to procedural due process of law.

In the interest of expediting resolution of the substantives issues, Section "**III. Status of Claims**" has been modified to list the cancelled claims.

Comments on Arguments

The Examiner commented as follows:

In the Arguments, Appellant should not draw conclusions on what

the Examiner may or may not have been considering, and should not speculate on why decisions were made. Most decisions require consideration of many different issues and can not be boiled down to one simple reason.

Appellants cries foul. The Examiner is attempting to deprive Appellant of his right to due process of law by telling Appellant what or what he may or may not argue. If the Examiner does not agree with Appellant's arguments, then the Examiner is free to offer a rebuttal argument in his answer. If the Examiner believes that Appellant inappropriately speculated on why decisions were made, the Examiner is free to disabuse the record by clarifying his position. To merely state that a reason can not be offered, leaves Appellants in the dark as to the basis for the Examiner's reasoning.

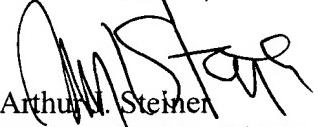
The bottom line is that the Examiner is not free to arm twist an Appellant into arguing what the Examiner would like to hear. Should the Examiner persist in further delaying tactics regarding this issue, the Examiner is requested to provide a basis for his actions consistent with due process of law.

Appellant request prompt consideration of the arguments advanced in the Appeal Brief.

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 500417 and please credit any excess fees to such deposit account.

Respectfully submitted,

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CLAIMS

11. An apparatus for processing meat which comprises:

a rotating paddle stationary vessel massager or rotating vessel tumbler containing impact vanes, each comprising a vessel for receiving bodies of meat in contact with a treating liquid and for agitating said bodies of meat to distribute said treating liquid in said bodies of meat;

means for selectively heating and cooling said vessel during the agitation of said bodies of meat therein;

a jacket for said vessel, said means for selectively heating and cooling said vessel comprising a refrigeration unit for cooling a liquid and circulating the cooled liquid through said jacket and a heater for heating a liquid and passing the heated liquid through said jacket selectively; and

a temperature sensor positioned for direct contact with bodies of meat in said vessel and operatively connected to said means for selectively heating and cooling said vessel for controlling a temperature of said vessel during the agitation of said bodies of meat therein, said temperature sensor being provided with a member capable of being thrust into said vessel to pierce a body of meat therein, said member having a plurality of sensing regions along a length thereof for providing an average temperature of the body of meat pierced thereby.

17. An apparatus for processing meat which comprises:

a rotating paddle stationary vessel massager or rotating vessel tumbler containing impact vanes, each comprising a vessel for receiving bodies of meat in contact with a treating liquid and for agitating said bodies of meat to distribute said treating liquid in said bodies of meat; and

means for selectively heating and cooling said vessel during the agitation of said bodies of meat therein, said vessel being a massager having a massaging drum formed with a temperature control jacket and a rotary paddle in said drum, said means for selectively heating and cooling said vessel including means for selectively circulating a heated and a cooled liquid through said jacket, said apparatus further comprising programming means for raising a temperature of said bodies of meat in said massaging drum to a predetermined elevated temperature while massaging said bodies of meat with a controlled torque of said rotary paddle.

18. The apparatus defined in claim 17, further comprising a temperature sensor positioned for direct contact with bodies of meat in said massaging drum and operatively connected to said means for selectively circulating said heated and cooled liquid through said jacket for controlling a temperature of said massaging drum during the agitation of said bodies of meat therein.

19. The apparatus defined in claim 18 wherein said temperature sensor extends through a wall of said massaging drum and is thermally insulated therefrom to respond directly to a surface temperature of bodies of meat in said massaging drum.

20. The apparatus defined in claim 18 wherein said temperature sensor is provided with a member capable of being thrust into an interior of said massaging drum to pierce a body of meat therein.

21. An apparatus comprising:

a rotating paddle stationary vessel massager or rotating vessel tumbler containing impact vanes, each comprising a vessel for receiving and agitating bodies of meat in contact with a treating liquid to distribute the treating liquid in the bodies of meat;

means for selectively heating and cooling the vessel while agitating the bodies of meat therein; and

a jacket, on the vessel, for circulating a liquid therethrough for selectively heating and cooling the vessel while agitating the bodies of meat.

22. The apparatus according to claim 21, further comprising a temperature sensor

positioned for direct contact with bodies of meat in the vessel and operatively connected to the means for selectively heating and cooling said vessel for controlling a temperature of the vessel while agitating the bodies of meat therein.

23. The apparatus according to claim 22, wherein the temperature sensor extends through a wall of the vessel and is thermally insulated therefrom to respond directly to a surface temperature of bodies of meat in the vessel.

24. The apparatus according to claim 22, wherein the temperature sensor is provided with a member capable of being thrust into the vessel to pierce a body of meat therein.

25. The apparatus according to claim 24, wherein the member has a plurality of sensing regions along a length thereof for providing an average temperature of the body of meat pierced thereby.

26. The apparatus according to claim 21, wherein the vessel is a massager having a massaging drum formed with a temperature control jacket and a rotary paddle in the drum, and the means for selectively heating and cooling the vessel includes means for selectively circulating a heated and a cooled liquid through the jacket.

27. The apparatus according to claim 26, further comprising programming means for raising a temperature of the bodies of meat in the massaging drum to a predetermined elevated temperature while massaging said bodies of meat with a controlled torque of the rotary paddle.

28. The apparatus according to claim 27, further comprising a temperature sensor positioned for direct contact with bodies of meat in the massaging drum and operatively connected to the means for selectively circulating the heated and cooled liquid through the jacket for controlling a temperature of the massaging drum while massaging the bodies of meat therein.

29. An apparatus comprising:
a rotating paddle stationary vessel massager or rotating vessel tumbler containing impact vanes, each comprising a vessel for receiving and agitating bodies of meat in contact with a treating liquid to distribute the treating liquid in the bodies of meat;

means for maintaining the bodies of meat during agitation at a predetermined elevated temperature sufficient to effect rapid, thorough and uniform distribution of the liquid within the meat, and to substantially reduce formation of a protein/water film, by selectively heating and cooling the vessel while agitating the bodies of meat therein; and

a jacket on the vessel for circulating a temperature controlling fluid.

30. The apparatus according to claim 29, wherein the means for selectively heating and cooling the vessel comprising a refrigeration unit for cooling a liquid and circulating the cooled liquid through the jacket and a heater for heating a liquid and passing the heated liquid through the jacket selectively.

31. The apparatus according to claim 30, further comprising a temperature sensor positioned for direct contact with bodies of meat in the vessel and operatively connected to the means for controlling a temperature of the vessel while agitating the bodies of meat therein.

32. The apparatus according to claim 31, wherein the vessel is a massager having a massaging drum formed with a temperature control jacket and a rotary paddle in the drum, the apparatus further comprising programming means for raising a temperature of the bodies of meat in the massaging drum to the predetermined elevated temperature while massaging the bodies of meat with a controlled torque of the rotary paddle.

33. An apparatus comprising:

a rotating paddle stationary vessel massager or rotating vessel tumbler containing impact vanes, each comprising a vessel for receiving and agitating bodies of meat in contact with a treating liquid to distribute the treating liquid in the bodies of meat;

means for maintaining the bodies of meat during agitation at substantially 45°F to 60°F by selectively heating and cooling the vessel while agitating the bodies of meat therein; and a jacket on the vessel for circulating a temperature controlling fluid.

34. The apparatus according to claim 33, wherein the means for selectively heating and cooling the vessel comprising a refrigeration unit for cooling a liquid and circulating the cooled liquid through the jacket and a heater for heating a liquid and passing the heated liquid through the jacket selectively.

35. The apparatus according to claim 34, further comprising a temperature sensor positioned for direct contact with bodies of meat in the vessel and operatively connected to the means for controlling a temperature of the vessel while agitating the bodies of meat therein.

36. The apparatus according to claim 35, wherein the vessel is a massager having a massaging drum formed with a temperature control jacket and a rotary paddle in the drum, the apparatus further comprising programming means for raising a temperature of the bodies of meat in the massaging drum to the predetermined elevated temperature while massaging the bodies of meat with a controlled torque of the rotary paddle.

37. The apparatus according to claim 11, comprising a rotating paddle stationary vessel massager.
38. The apparatus according to claim 17, comprising a rotating paddle stationary vessel massager.
39. The apparatus according to claim 21, comprising a rotating paddle stationary vessel massager.
40. The apparatus according to claim 29, comprising a rotating paddle stationary vessel massager.
41. The apparatus according to claim 33, comprising a rotating paddle stationary vessel massager.

Docket No.: 071836-0012

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of

WOLFGANG LUDWIG

Application No.: 09/808,395

Filed: March 14, 2001

For: METHOD OF AND APPARATUS FOR THE PROCESSING OF MEAT



Customer Number: 20277

Confirmation Number: 3668

Group Art Unit: 1761

Examiner: D. Becker

**LETTER IN RESPONSE TO THE NOTIFICATION OF
NON-COMPLIANT APPEAL BRIEF**

Mail Stop Response
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

REMARKS

The Examiner issued a Notification of Non-Compliant Appeal Brief dated June 21, 2005 raising procedural issues. Appellant submits herewith a Supplemental Appeal Brief (in triplicate) in response thereto.

The Examiner's notification comprises two sections. One section contains boxes, some of which are checked. After the 10th box, the Examiner provided comments. Appellant will address each issue below.

Box 4 and Related Comments

The Examiner checked box 4 which requires the Brief to contain a concise explanation of the subject matter defined in each independent claim as well as an identification of every means plus function element. This was believed to be originally done. The means plus function element was not identified in the specification because it was specified in the claims. At any rate, in order to expedite resolution of this Appeal, Appellant has referred to each element of each independent claim by reference to the specification and/or drawings, and has identified the structure disclosed in the specification to perform the recited functions.

The Examiner also stated in his explanation "The Summary should not refer to references or any other applications." Appellant hereby challenges the basis for the Examiner's assertion. The Examiner has no authorization to go beyond the rules. The rules state what must be in the Summary. The rules do not preclude or tie an Appellant's hands from making comments. The Examiner is not free to coerce an Appellant into writing a Brief which pleases the Examiner. It should be noted that the other application mentioned by the Examiner is the **published application of the present specification** which was referred to by paragraph numbers for ease of understanding. At any rate, and again in order to expedite resolution of the substantive issues involved in the Appeal, the Summary has been revised without referring to any applied reference and by referring to the original application.

Box Number 6 regarding arguments for each Ground of Rejection

The Examiner checked box 6 which states that the Brief did not contain an argument under a separate heading for each ground of rejection on Appeal. The Examiner explained that five rejections were imposed, but the **final two grounds of rejections were not separately argued**. This observation is undeniably accurate, because **Appellant chose not to separately argue the patentability of certain dependent claims.**

Is the Examiner attempting to coerce Appellant to make an argument Appellant does not want to make? The Examiner may have overlooked the fact that in the first paragraph under Section VIII argument, it was stated that the patentability of claims 11, 17, 21, 29 and 33 was argued. Appellant further separately listed the final two rejections and expressly stated that the rejected claims stand or fall with independent claims upon which they depend. **What is wrong with this?**

At any rate, and again in order to expedite resolution of the substantive issues on Appeal, additional language has been provided in the arguments grouping the claims argued and specifically stating that the separate patentability of the claims encompassed by rejections 4 and 5 is not argued.

Box 7 and Issues related to the appealed claims

The Examiner checked box 7 which indicates the Brief does contain a correct copy of the appealed claims as an Appendix thereto. The Examiner is wrong. The “Claims appendix” contains the appealed claims which are “the claims involved in the appeal”. The Examiner appears to be of the opinion that cancelled claims should be included in the Claims appendix. Since the cancelled claims are not involved in the appeal, Appellant hereby questions the basis

for the Examiner's requirement for cancelled claims to appear in the Claims appendix.

Appellant would refer to 37 CFR §41.35(viii), which reads as follows:

Claims appendix. An appendix containing a copy of the claims **involved in the appeal**. (Emphasis supplied).

Since the cancelled are not "involved in the appeal", Appellant did not include the cancelled claims in the Claims appendix.

In the interest of expediting resolution of the substantives issues, Section "**III. Status of Claims**" has been modified to include the cancelled claims.

Comments on Arguments

The Examiner commented as follows:

In the Arguments, Appellant should not draw conclusions on what the Examiner may or may not have been considering, and should not speculate on why decisions were made. Most decisions require consideration of many different issues and can not be boiled down to one simple reason.

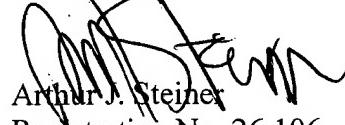
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Application No.: 09/808,398

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 500417 and please credit any excess fees to such deposit account.

Respectfully submitted,

McDERMOTT WILL & EMERY LLP



Arthur J. Steiner
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Facsimile: 202.756.8087
Date: July 6, 2005

**Please recognize our Customer No. 20277
as our correspondence address.**

McDermott Will&Emery

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Munich New York Orange County Rome San Diego Silicon Valley Washington, D.C.

Arthur J. Steiner
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July 6, 2005

Mr. Ralf Ludwig
WOLF-TEC, INC.
20 Kiefer Lane
Kingston, NY 12401 USA

Re: U.S. Patent Application No. 09/808,398
For: METHOD OF AND APPARATUS FOR THE PROCESSING OF MEAT
Inventor: WOLFGANG LUDWIG
Our Reference: 071836-0012

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AJS:ntb
Enclosure

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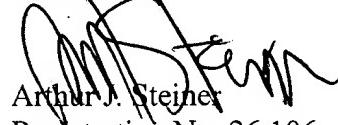
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